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No. 75-1707

Supreme Court of the United States

October Term, 1975

OHIO BUREAU OF EMPLOYMENT SERVICES
and
ALBERT G. GILES,

Appellants,

v.

LEONARD PAUL HODORY,

Appellee.

On Appeal from the United States District Court from the Northern District of Ohio, Eastern Division

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby respectfully moves for leave to file the attached brief *amicus curiae* in the instant case as provided for in Rule 42 of the Rules of this Court. Counsel for appellants have consented to the filing of that brief, but counsel for appellees have refused such consent. This motion and the attached brief are filed within 30 days of the filing of the Brief of Appellants in this Court.

INTEREST OF THE AMICI CURIAE

The AFL-CIO is a federation of 109 national and international unions having a total membership of approximately 14,000,000 men and women. This case involves an

important question involving the unemployment compensation system, which was designed to protect "industrial workers ordinarily employed." (Committee on Economic Security, *Report to the President,* 13 (1935). That, of course, is an accurate description of the great majority of trade union members. Consequently, the AFL-CIO has participated, both as a party and as *amicus curiae* in several cases concerning the unemployment insurance system, including *California Department of Human Resources,* v. *Java,* 402 U.S. 121; *Indiana Employment Security Div.* v. *Burney,* 409 U.S. 540; *Fusari* v. *Steinberg,* 419 U.S. 379; and *Crow* v. *California Dept. of Human Resources Development,* 420 U.S. 917.

THE ISSUES TO BE COVERED IN THE BRIEF AMICUS CURIAE

The issue decided by the three-judge court was whether the denial of unemployment compensation benefits to a class of approximately 1250 steelworkers assertedly because their unemployment was due to a strike by coal miners at mines owned by their employer denied those steelworkers equal protection of the laws. On the understanding that this issue will be explored in depth by the parties, we do not address it directly in our brief.

However, appellants and certain *amici curiae* appearing on their behalf raise another contention in this Court—that the federal labor policy favoring the free use of economic weapons precludes states from paying unemployment compensation benefits to persons involved in labor disputes generally, and to persons in the situation of the *Hodory* class in particular. In Part II of our brief, we demonstrate that this contention is both erroneous and, at

any rate, not pertinent to the resolution of this case.

Before reaching that issue, in Part I of our brief we explain that perusal of the briefs and record in this case raises the constitutional question whether the court below should have reached the constitutional issue at all or should, instead, have retained jurisdiction to await determination of unsettled questions of state law by the state courts. The *Hodory* class has appeals pending before the state Board of Review, contending that the denial of benefits to them was improper under state law. These appeals have been stayed pending the outcome of this case. The abstention question was raised before the district court and addressed in its opinion; although alluded to by appellants in this Court, it has not been directly raised here.

We demonstrate in Part I that the district court's assumption that no uncertain question of state law is involved in the state appeals may well be incorrect; indeed, it appears that an even larger class of steel workers laid off by the same steel companies assertedly because of the same mine strike *were* granted benefits, and that Ohio law is unclear in several pertinent respects. We therefore suggest, after reviewing cases of this Court concerning the abstention doctrine, that the propriety of the district court's decision to proceed with constitutional adjudication should be reviewed by this Court.

CONCLUSION

Because the attached brief covers two issues which we believe will not be adequately covered by the parties, this motion for leave to file a brief as *amicus curiae* should be granted.

Respectfully submitted,

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) contingent on the granting of the foregoing motion for leave to file a brief as *amicus curiae.*

INTRODUCTION AND SUMMARY OF ARGUMENT

This constitutional case comes to this Court in an odd posture. Appellees have a substantial state statutory claim which is pending before the agency established by the state to administer that statute and which that agency has not resolved, awaiting disposition of the equal protection clause question posed here. Mindful of the principle that consti-

tutional claims should be decided only when necessary, we therefore begin by describing the context in which this controversy arises; discussing the state statutory issue inherent in that context; and, after reviewing the Ohio law and the basis for our view that the state statutory claim is substantial, point out the possible application of the abstention doctrine to this case.

In Part II of our brief we address the contention in appellants' brief that federal labor policy requires the states to deny unemployment compensation to employees laid off by a company because other employees of that company are on strike. We demonstrate therein that this Court in *Kimbell, Inc.* v. *Employment Security Commission,* ..... U.S. ....., 45 U.S.L.W. 3247 (Oct. 4, 1976), rejected the general proposition that federal law precludes state determination to pay unemployment compensation to persons on strike; that the initial administrators of the Social Security Act expressly approved as consistent with federal law state payment of benefits to persons unemployed due to a labor dispute but not themselves on strike; and that this supremacy clause argument is, in any event, beside the point here since the decision below rests on the equal protection clause and a federal law like a state law is subject to invalidation if it lacks a rational basis.

ARGUMENT

I

1. At the pertinent time, § 4149.29(D)(1)(a), Ohio Rev. Code provided, so far as is relevant here, that an unemployment compensation claimant is disqualified:

> "For any week with respect to which the administrator finds that * * * his unemployment was due to a labor dispute other than a lockout at any factory, establishment, or other premises located in this or any other state and owned or operated by the employer by which he is or was last employed; and for so long as his unemployment is due to such labor dispute."[1]

Mr. Hodory and approximately 1250 other employees at certain plants of Republic Steel and United States Steel in Ohio were denied benefits by appellant Ohio Bureau of Employment Services because their unemployment was allegedly "due" to a labor dispute at coal mines owned by the steel companies. Appeals were taken on behalf of all these employees to the administrative Board of Review. (App. 50.) The Board of Review, since the filing of Mr. Hodory's complaint in this case, has determined not to rule upon these appeals until this lawsuit is finally resolved.[2] (Jurisdictional Statement, at 6; Brief for Appellants, at 4.)

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[1] This subsection was amended, effective Dec. 2, 1975, to provide that:

> "No individual shall be disqualified under this provision if: (i) his employment was with such employer at any factory, establishment, or premises located in this state, owned or operated by such employer, other than the factory, establishment, or premises at which the labor dispute exists, if it is shown that he is not financing, participating in, or directly interested in such labor dispute." (App. 51.)

This amendment has, to our knowledge, not yet been construed by Ohio courts. It does appear from the language, however, that claimants in the position of the *Hodory* class but laid-off after the effective date of the amendment are eligible for benefits.

[2] The reason why the Board of Review has decided to await the final resolution of this case before deciding whether benefits are due either the *Hodory* class or the other steelworkers assertedly affected by the mine strike (see p. 4, *infra*) is not stated. While the airing and resolution of the state law questions could affect the merits of the constitutional adjudication (see pp. 13-15, *infra*) the only re-

Mr. Hodory initially sought to represent an expansive class of persons assertedly similarly situated—all those whose claims for unemployment benefits have been or will be denied because of the operative effect of § 4141.29(D)-(1)(a). The three-judge court, however, declined to certify this broad class. (App. 55.) Instead, it recognized Mr. Hodory as properly representing under Rule 23 of the Federal Rules of Civil Procedure only the "approximately 1250 members of the United Steelworkers in Ohio, who became unemployed through no fault of their own, [and] were denied unemployment benefits by defendants for a specific period of time because of the labor dispute disqualification clause in § 4141.29(D)(1)(a), despite the fact that they may have been qualified in all other respects to receive the benefits," (App. 55) and the relief granted was limited to this class (App. 60, 61).

It appears that there was another large group of steelworkers laid off at the same time by the same steel companies assertedly for the same reason—the nationwide mineworkers' strike—who *were* granted benefits by appellant Bureau. (Br. for Appellants, at 3.) According to appellants, "[t]he steel companies are appealing these decisions in the

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verse effect of the constitutional issues upon the state administrative proceedings we can perceive is that if the order below is upheld it may be unnecessary for the Board to decide certain state law issues. (Since the order only requires paying of benefit to those denied "solely on the basis of § 4141.29(D)(1)(a)" (App. 61), some unrelated state law questions may remain with regard to some class members.) The substance of the state law issues appears entirely unaffected by this case, and, therefore, if the Board or the state courts were to decide that the discharges were not "due" to a labor dispute within the meaning of state law, benefits would be paid under state law regardless of the outcome of this case.

state courts." (*Id.*)[3] The reason benefits were granted to this group was, again according to appellants, that "the company owned coal mines did not supply a sufficient amount of fuel to effect a plant shut down." (*Id.*) Appellants do not discuss what degree of dependence was "not • • • sufficient" to render the lay-offs "due" to a labor dispute, nor do the parties or the district court explain how the situation of the *Hodory* class differed from that of the other steel workers who were granted benefits.[4]

This set of circumstances in itself appears to us at least to raise the question whether the three-judge court ought to have reached the constitutional issue it decided. For Ohio

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[3] As an *amicus curiae* the AFL-CIO is of course not familiar with this set of events except as they appear in the record and briefs in this case. The purpose of this summary and of the legal analysis which follows is, therefore, merely to point out circumstances which might merit further inquiry by the Court from the parties in order to determine whether the constitutional issue ought to be reached in this case. Counsel for appellants has informed us, however, that in fact the steel companies' appeal is still at the Board of Review stage and has been stayed pending this Court's *Hodory* decision; *other* cases arising from similar but separate situations and involving related issues of state law are, again according to counsel for appellants, now pending in state court after completion of administrative appeals but have also been stayed awaiting the outcome of this case.

[4] Moreover, appellants do not tell us whether the question of dependency upon company-owned coal was determined on a plant-by-plant basis, rather than inquiring into the degree to which all the Ohio plants of each employer depended on such coal, and if so, why. Appellants note (Br. for Appellants, at 35) that while the *Hodory* class numbers about 1,250 claimants, company records show that 2,696 claimants were laid off by the company. It therefore appears that approximately 1,446 employees of the company have been held eligible for benefits although laid-off during the coal strike.

law seems to be entirely unclear as to what constitutes unemployment "due" to a labor dispute—that is, what degree of dependence upon the product of a struck facility is necessary before an employer may successfully show that lay-offs at one of his plants was "due" to the strike at another.

2. Insofar as the court below recognized at all the existence of a state statutory claim, it simply assumed that "Section 4141.29(D)(1)(a), on its face, would appear to except the plaintiff from unemployment benefits" (App. 52) and that therefore "Section 4141.29(D)(1)(a) is not an ambiguous statute involving unsettled questions of state law" (App. 54). That assumption is belied by the seemingly contradictory results in the proceedings just described. Indeed, our review of the state cases leads us to the conclusion that those cases are not at all inconsistent with the *Hodory* class' ultimate success upon the claims pending before the state Board of Review.

To be sure, it is true, as the court below noted, that it *is* entirely clear under Ohio law that claimants may be disqualified under the labor dispute exception although they are "involuntarily" unemployed in the sense that they are not participating in the dispute. (App. 53, citing *Cornell* v. *Bailey*, 163 Ohio St. 50, 125 N.E.2d 323 (1955).) But the circumstances in which a lay-off is considered to be "due" to the labor dispute are much less lucid.

State cases construing the labor dispute disqualification *have* made clear that the mere concurrence of lay-offs and a labor dispute is insufficient to show that the lay-offs were due to the dispute. "[I]n order to disqualify claimants it must be determined that there was a direct causal relationship between the • • • dispute and claimant's loss of em-

ployment." (*Cornell* v. *Bailey, supra.* See also *McGee* v. *Timken Roller Bearing Co.*, 161 N.E.2d 905 (Ohio Ct. of App. 1956); *Baumgarte* v. *Bd. of Rev.*, 186 N.E.2d 146 (Ohio Ct. of Common Pleas, 1961; cf. *Leach* v. *Republic Steel Corp.*, 176 Ohio St. 240, 199 N.E.2d 3 (Ohio Supr. Ct. 1964).) Those reported cases in which dispute occurred at a location separate from that which claimants were employed and such causation was found appear to stress at least two factors: (1) the products of the plant which was struck were non-fungible goods essential to the activities at the location where claimants were employed; (2) the claimants' plant was entirely dependent upon those products, and no management reallocation of resources could change that situation. For example, in *McGee, supra,* the court noted that the Toledo plant, where claimants worked, did not fabricate from raw materials but, rather, inspected and assembled insulators produced by the struck plant at Hamtramck; it also mentioned that there were patents involved, so that presumably the insulators could not be purchased elsewhere; and it discussed the question whether insulators produced by other plants of the employer could have been used, and concluded that it "would not be possible for the Toledo plant to continue functioning • • • if the Hamtramck plant were out of existence." (*Id.*, at 912.) The Ohio court held, therefore, that "[t]he inescapable conclusion • • • is that claimant's temporary unemployment at the Toledo, Ohio plant was caused directly and proximately by a labor dispute." (*Id.*)

While the basic requirement of direct and proximate causation is thus clear, the Ohio courts have not elucidated the principles governing situations in which such causation will be found not to exist. In particular, this case

seems to vary from *McGee, supra* in at least three ways which may, or may not, be relevant under state law:

1. The coal strike was nationwide rather than limited to the employers' mines and this could have been the reason why alternative supplies were not available or sought. Thus, it may be that while the lay-offs were "due" to *a* labor dispute, they could be held to be not "due" to the dispute *at the employers' mines,* as the statute requires. (Cf. *Baumgarte, supra.*)

2. The claimants' plants may not have ordinarily received *all* of their coal supplies from the struck locations.[5]

3. The struck product here was a fungible commodity which the employer perhaps *could* have purchased elsewhere and thereby have continued to operate.[6]

Thus, it would be consistent with the prior cases and the rationale of the labor dispute disqualification for the state courts to hold that, for any one of these three reasons, the lay-offs were not "due" to the labor dispute at the companies' mines within the meaning of the state statute.

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[5] As noted, p. 5, *supra,* the degree of dependence upon the employers' own coal does not appear. However, as also noted, p. 4-5, *supra,* other employees of the same companies laid off at the same time were held eligible, because the companies were not sufficiently dependent on their own coal mines for coal supplies. We have been informed by counsel for appellants that the Department devised an arbitrary percentage test for determining the disqualifying degree of reliance, although counsel did not know exactly what percentage was considered disqualifying or whether that same test was applied to the *Hodory* class.

[6] Other steel companies did continue to operate during the coal strike by importing coal. (See *American Metal Market,* Vol. 81, No. 242 (Dec. 13, 1974), at 3.)

3. What we have said thus far implicates the doctrine that the federal courts in certain circumstances ought not decide constitutional questions until uncertain questions of state law have been resolved by the state courts. Indeed, although appellants do not in this Court contend that the three-judge court should have abstained from reaching the constitutional question in order to await clarification of state law, the question was raised before the court below and addressed in its opinion. (Br. for Appellants, at 5; App. 54.)[7] The court below noted, correctly, that " 'absten-

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[7] We do not know why appellants have not raised the abstention question in this Court. However, it does appear that they may be in a peculiar situation which makes it difficult for them to do so. For appellants themselves, of course, have decided that, as far as they are concerned, state law does disqualify the *Hodory* class. To present a proper abstention argument would require demonstrating that this in fact may not be true—that state law may in fact be construed on administrative appeal or by state courts not to disqualify that class, because their unemployment was not "due" to a labor dispute within the meaning of § 4141.29(D)(1)-(a). The abstention argument appears to have been presented to the court below without analysis of the unsettled state of Ohio law in this regard but, instead, on the assumptions that the only issues were either factual or premised on the federal constitution. (*See* App. 52-54). However, "the fact that the full arguments in favor of abstention may not have been asserted in the District Court does not bar this Court's consideration of the issue," (*Bellotti* v. *Baird,* ..... U.S. ....., 44 U.S.L.W. 5221, 5224 n. 10), and the fact that abstention is not specifically relied upon here is immaterial, since "abstention may be raised by the court *sua sponte.* See *Railroad Comm'n* v. *Pullman Co.* [312 U.S. 496], Cf. *England* v. *Board of Medical Examiners,* 375 U.S. 411, 413." (*Id.*)

Both appellants and the three-judge court linked the abstention question to the fact that administrative appeals were (and are) pending (Br. for Appellants, at 5; App. 51, 54). In fact, the abstention doctrine does not depend upon the existence of concurrent state proceedings, administrative or judicial (see, e.g.,

tion should not be applied merely to await an attempt to vindicate a claim of the appellant in state court.' " (App. 54, quoting *Gay* v. *Board of Registration Commission,* 466 F.2d 879, 885 (6th Cir. 1972). See e.g. *Wisconsin* v. *Constantineau,* 400 U.S. 433; *Zwickler* v. *Koota,* 389 U.S. 241, 250-252.) But

> "[w]here resolution of the federal constitutional question *is dependent upon, or may be materially altered by, the determination of an uncertain issue of state law,* abstention may be proper in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication * * *. The doctrine * * * contemplates that deference to state court adjudication only be made where the issue of state law is uncertain." *Harman* v. *Forssenius,* 380 US 528, 534, 14 L Ed 2d 50, 55, 85 S Ct 117 (1965)." (*Lake Carriers' Assoc.* v. *McMullen,* 406 U.S. 498, 511 (emphasis supplied).)

Thus, while abstention is appropriate "only in 'special circumstances,' see *Zwickler* v. *Koota,* 389 U.S. 241, 248, and only upon careful consideration of the facts of each case [,] *Baggett* v. *Bullitt,* 377 U.S. 360, 375-379; *Railroad Comm'n* v. *Pullman Co.* [312 U.S. 496, 500]," (*Harris County Comm'rs Court* v. *Moore,* 420 U.S. 77, 83),[8] "the

Lake Carriers' Assoc v. *McMullen, supra,* at 512-513; *Harris County Comm'rs Court* v. *Moore,* 420 U.S. 77, 81 n.3, 88-89), and, conversely, as the district court correctly recognized, the pendency or availability of state administrative remedies does not itself defeat federal court jurisdiction under 42 U.S.C. § 1983 (*Damico* v. *California,* 389 U.S. 416. Cf. *Gibson* v. *Berryhill,* 411 U.S. 564, 574; *Burrell* v. *McCray,* ..... U.S. ....., 44 U.S.L.W. 4860 (dismissing cert. as improvidently granted)).

[8] For example, abstention often involves delay and expense (see

paradigm case for abstention arises when the challenged state statute is susceptible of a 'construction by the state courts that would avoid or modify the [federal] constitutional question. *Harrison* v. *NAACP,* 360 U.S. 167 * * *." (*Lake Carriers', supra,* at 510-511, quoting *Zwickler* v. *Koota,* supra, at 249.)

The three-judge district court recognized the basic parameters of the abstention doctrine,[9] but appears to have

England v. *Board of Medical Examiners, supra; Reetz* v. *Bozanich,* 397 U.S. 82, 86), and avoidance of protracted delay and expense is a valid consideration in determining whether or not a federal court should abstain. (*Public Utilities Commission* v. *United Fuel Gas Co.,* 317 U.S. 456, 463; *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.,* 377 U.S. 324, 329; *Harris County Comm'rs Court* v. *Moore, supra,* at 84). Here, however, it may well be that the *failure* to abstain has contributed to the fact that the *Hodory* class has not yet received benefits for a period of unemployment which occurred two years ago. For, as a consequence, both questions of state law and simple factual issues have not been settled in the administrative process. In particular, while not relevant to the abstention question because no unsettled state law is involved, it seems quite possible that the *Hodory* class could prevail on appeal simply because the steel lay-offs appear to have been exactly concurrent with the beginning of the mine strike and therefore may not have been caused by a lack of coal due to the strike. (See jurisdictional statement, at 45-46 (showing that Hodory filed a claim for the week ending 11/16/74) and BNA, Labor Relations Yearbook, 1974, p. 5 ("Chronology of Major Events" stating that coal strike began at midnight November 11, 1974).) Ohio law clearly provides that a lay-off is not "due" to a labor dispute at another facility of an employer if work could have proceeded substantially as usual despite the strike. (*McGee* v. *Timken Roller Bearing Co., supra; Baumgarte* v. *Board of Review, supra.* It appears extremely unlikely that the steel plants had no coal stockpile whatever.

[9] The district court ruled not only upon abstention but upon the related but separate contentions that the doctrine requiring exhaustion of administrative remedies or the prohibition against

evidenced a slight misunderstanding. For the court seemed to regard abstention as appropriate only if the state statute "could be rendered constitutionally inoffensive by a limiting construction in the state courts." (App. 54.) In fact, while it is necessary to trigger abstention that the state law be uncertain, it is not necessary that a construction be available which would obviate any conceivable constitutional objections. Rather, since one purpose of abstention is to avoid "premature constitutional adjudication" (*Lake Carriers', supra,* at 511), it may be sufficient that no constitutional questions will arise after interpretation with regard to the particular parties, because the statute will be determined not to apply to their detriment. For example, the seminal abstention case, *Railroad Comm'n* v. *Pullman,* 312 U.S. 496, turned upon the fact that

> "[c]onstitutional adjudication plainly can be avoided if a definitive ruling on the *state* issue would terminate the controversy. • • • If there was no warrant in state law for the Commission's assumption of authority there is an end of the litigation; the constitutional issue does not arise." (*Id.,* at 501.)

Thus, abstention may be appropriate "in cases presenting a federal constitutional issue which might be mooted • • • by a state court determination of pertinent state law." *County of Allegheny* v. *Frank Mashuda Co.,* 360 U.S. 185, 189.

Further, abstention may also be proper where resolution of the state law question, whether in favor of or against the

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federal court injunctions of certain state judicial proceedings (see *Younger* v. *Harris,* 401 U.S. 37; *Huffman* v. *Pursue,* 420 U.S. 592) required dismissal of this case. The rulings upon the latter two questions are quite correct, for the reasons given by that court. (App. 52-54.) See n. 7, *supra.*

party invoking federal court jurisdiction, will not enable the federal court to avoid the federal question but will "significantly modify the federal questions" raised (*Lake Carriers', supra,* at 512), by "materially [changing] the nature of the problem." (*Harrison* v. *NAACP,* 360 U.S. 167, 177. See, e.g., *Harris County, supra,* at 87-88 & n. 11.) In a case such as this, which arises under the equal protection clause of the Fourteenth Amendment and in which the basic question is therefore whether the statutory standards "were reasonable ones with 'some basis in practical experience'" (*City of Charlotte* v. *Firefighters,* ..... U.S. ....., 44 U.S.L.W. 4801, 4803), it may be important to understand precisely the circumstances in which the labor dispute disqualification applies. The pertinence of the reasons offered to justify the exclusion may thus be illuminated, and the rationality of the exclusion, if it persists after state court interpretation, may therefore be affected by a clear understanding of where the exclusionary line is drawn.

Applying the foregoing principles, it is clear, first, that if any of the open state statutory questions are resolved in favor of the *Hodory* class, "there is an end of the litigation; the constitutional issue does not arise." (*Railroad Comm'n* v. *Pullman, supra.*) Second, exploration of these issues in state court could in any event "materially change the nature of the [constitutional] problem." (*Harrison* v. *NAACP, supra.*)

In particular, the resolution of these questions under state law could throw light upon the pertinence of the justifications offered by the state for the disqualification attacked by appellees. The state relies heavily in justifying the

exclusions upon two interests: (1) "assuring an adequate money reserve in its unemployment fund since its resources are limited by the tax vote on employers" (Br. for Appellants, at 11); and (2) "the policy of the State of Ohio to remain neutral in labor disputes" (*Id.*, at 23). As to the former, while this Court has held that fiscal considerations are not irrelevant in evaluating the rationality of an exclusion in a social welfare program (see, e.g., *Dandridge* v. *Williams*, 397 U.S. 471), the exclusion may not be entirely arbitrary; it must still have "some 'reasonable basis' ". (*Id.*, at 485.) If the state courts were to hold that lay-offs are "due" to a labor dispute although the employer could continue to operate by purchasing supplies elsewhere, it would appear that no distinction whatever, rational or otherwise, between the labor dispute disqualification and an ordinary employment decision to cease production for some period of time would remain, although employees laid off in the latter situation are eligible for benefits. Similarly, if the statute were interpreted to disqualify individuals working in plants which usually received, for example, more than 50% of their coal from company-owned mines but not plants of the employer which received less than 50% of their coal from such mines, it might be viewed as arbitrary for that reason alone, particularly since the company could presumably reallocate the coal from its mines if it wished to. Finally, disqualification by use of the percentage test in the context of a strike in *all* coal mines, such that no domestic coal would have been available whether or not the companies owned their own mines and the lay-offs would have therefore occurred in any event, seems entirely irrational.

Elucidation of the statute by the state courts could also

affect the weight given in constitutional adjudication to the "neutrality" justification.[10] For if the statute were held to disqualify claimants not involved in the strike and laid-off although the employers could have continued to operate, it would appear to insulate employers only from the increased cost, if any, of so operating, an economic cost of a strike unrelated to any governmental intervention. Thus, the state would not be neutral in the dispute; instead, it would be in effect subsidizing the *employer* by permitting him, in this one situation in which he decides to close down operations at his option, to do so without incurring the increase in unemployment taxes ordinarily the consequence of massive lay-offs due to management decisions or economic conditions. Further, if the state courts were to regard the lay-offs as "due" to a labor dispute at an establishment of the employer although, because of the nationwide nature of the strike, no domestic coal would have been available in any event, the state, far from being neutral, would be favoring a manufacturer who owns a coal mine over one who does not, even though they occupy the same economic position.

II

If the Court determines, after exploring the relevant factual and legal considerations, that abstention is not appropriate, it will be faced not only with the equal protection question decided below but with the contention of appellant and certain *amici curiae*[11] that the decision below must be

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[10] For reasons stated in Part II, *infra*, we do not regard the neutrality justification as a pertinent factor in this case if the Court proceeds to determine the constitutional questions at this juncture.

[11] See Brief for Appellants, at 23-24; Brief for the Chamber of Commerce of the United States as *Amicus Curiae*, at 4-20. See also Brief for Republic Steel Corporation as *Amicus Curiae*, at 17.

reversed because of the federal labor policy favoring free use of economic weapons in a labor dispute. This contention fails for three reasons. First, this Court, in *Kimbell, Inc.* v. *Employment Security Commission* ..... U.S. ....., 45 U.S.L.W. 3247 (Oct. 4, 1976), recently rejected the general proposition that payment of unemployment benefits to persons unemployed because of a labor dispute is forbidden as contrary to the Supremacy Clause. Second, the payment of benefits to persons unemployed due to a labor dispute but not themselves on strike was *explicitly* declared by the Social Security Board shortly after the Act was passed to be not only permissible but preferable, and almost all states do pay persons in the situation of Mr. Hodory. Thus, even if paying unemployment benefits to strikers *were* pre-empted, payment to persons uninvolved in the dispute but out of work as a consequence thereof would *not* be. Third, *even* if the pre-emption contention here were valid, that could not possibly determine the constitutional issue before the Court in this case. For a federal policy requiring the states to legislate in a certain manner is fully capable itself of violating the equal protection guarantee.[12] Thus, if the Ohio statute here attacked is irrational and therefore unconstitutional, the fact that it is irrational because federal policy so requires would not make the state statute valid; it would rather render the federal policy itself unconstitutional inso-

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But see Brief for United States Steel Corporation as *Amicus Curiae*, at 11, recognizing, correctly in our view, that there is "no federal pre-emption on the question whether benefits must be paid or denied to otherwise eligible and qualified claimants who lose or leave their work because of a labor dispute."

[12] The equal protection guarantee, of course, applies as against federal as well as state action. (See, e.g., *Mathews* v. *DeCastro*, ... U.S. ....., 45 U.S.L.W. 4049, 4049 n.1.)

far as it requires irrational legislation by the states.

1. The question whether federal labor policy precludes states from ever paying unemployment benefits to persons involved in labor disputes was before this Court less than three months ago in *Kimbell, supra*. New Mexico provides such benefits to strikers if their employer continues to operate despite the strike. Appellants in *Kimbell* contended that federal labor policy requiring state neutrality in the collective bargaining process forbid these payments.

Before acting upon *Kimbell*, this Court invited the United States to submit its views upon the question presented.[13] (44 U.S.L.W. 3685.) Noting that the pre-emption question turns initially upon Congress' intent when it enacted the National Labor Relations Act (29 U.S.C. § 151 *et seq.*), and the Social Security Act as here pertinent (26 U.S.C. § 3301 *et seq.*)[14], the Solicitor General, in a brief joined by the General Counsel of the National Labor Relations Board, took the position that the history of these acts showed conclusively that Congress left to the states whether and to what degree direct involvement in a labor dispute ought to disqualify a claimant from unemployment compensation benefits. This view, the Solicitor General pointed out, was reinforced by later legislative developments under the So-

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[13] The question presented in *Kimbell* was: "Does the grant of unemployment compensation benefits to strikers by the State of New Mexico contravene the Supremacy Clause of Article VI of the Constitution of the United States by disrupting the operation of federal labor policy requiring state neutrality in the collective bargaining process." (Jurisdictional Statement, in *Kimbell, supra*, at 4.)

[14] The original National Labor Relations Act and the basic legislation creating a national unemployment insurance program (Titles III and IX of the Social Security Act of 1935) moved

cial Security Act, the NLRA,[15] the Railroad Unemployment Insurance Act, and in the statutes dealing with food stamps and various welfare programs. (Memorandum for the United States as Amicus Curiae in *Kimbell, supra,* at 5-8.) On this basis, the Solicitor General concluded that Congress had determined to permit diversity among the states with regard to disqualification of individuals directly involved in labor disputes to continue.[16]

through Congress at the same time. The Wagner Act was enacted into law on July 5, 1935, and the Social Security Act became law on August 14, 1935. Senator Wagner was a sponsor of both pieces of legislation.

[15] One of the key later developments was an attempt to amend the National Labor Relations Act in 1947 to strip unemployment compensation recipients of their "employee" status under the Act. This history is reviewed in the Solicitor General's Memorandum in *Kimbell* (at 6-7). The decision to reject a provision enacted by one house of Congress which would have had substantially the preemptive effect relied upon by appellants must be taken to constitute a rejection of the premise of that provision—that there is a fundamental inconsistency between the NLRA and the payment of unemployment insurance to persons out of work due to a labor dispute—since "it is clear that those interested in just such a [result] were unable to secure its embodiment in enacted law." *Labor Board* v. *Drivers Local Union*, 362 U.S. 274, 290.

[16] The suggestion that, because persons on strike are "employees" under the NLRA, they cannot be considered unemployed for purposes of state unemployment statutes (Br. for Chamber of Commerce as *Amicus Curiae,* at 15, n. 9) is entirely misconceived. The precise decision made by Congress in 1947 (see n. 15, *supra*) was to reject a provision in the House bill which would have eliminated from the definition of "employee" in the NLRA those strikers who are receiving unemployment compensation benefits. Thus, Congress not only determined that the payment of such benefits is not inconsistent with the national labor policy, but that the definitions of "employee" in the NLRA and the state unemployment compensation laws need not coincide. Moreover, *nonstrikers,* like appelles,

We recognize, of course, that summary affirmances and dismissals for want of a substantial federal question[17], while binding upon lower courts (*Hicks* v. *Miranda,* 422 U.S. 332, 344-345), are not necessarily accorded the same weight in this Court as decisions rendered with full opinion after oral argument. (*Edelman* v. *Jordan,* 415 U.S. 651, 671.) In this instance, however, there was only one question presented,

who are laid off are considered "employees" for purposes of the NLRA if "they [have] a reasonable expectancy of further employment in the foreseeable future." (*Scobell Chemical Co.* v. *NLRB,* 267 F.2d 922 (2nd Cir.).) Under this test, ordinary laid-off employees are regularly held to be "employees" within the definition of the NLRA. (*Scobell, supra; American Export Lines,* 81 NLRB 1499; *Sullivan Surplus Sales, Inc.,* 152 NLRB 132; *D&H Farms,* 192 NLRB 53.) Yet, such persons can clearly be unemployed within the meaning of the unemployment compensation law of every state, including Ohio (see § 4141.29(A)(4)(a), Ohio Rev. Stat.), if they are not in fact working. Indeed, since "[t]he purpose of the Act was to give prompt if only partial replacement of wages to the unemployed, to enable workers to 'tide themselves over, *until they get back to their old work* or find other employment * * *'" (*California Department of Human Resources* v. *Java,* 402 U.S. 121, 131, quoting H. R. Rep. No. 615, 74th Congress, 1st Sess., 7 (1935) (emphasis supplied)), they are at the core of those whom the unemployment compensation system was intended to protect.

[17] The suggestion of the Chamber of Commerce (Br. of the Chamber of Commerce of the United States as *Amicus Curiae,* at 18 n. 11) that this Court did not decide the federal question presented in *Kimbell* on the merits is obviously incorrect. None of the parties or *amici curiae* appearing in *Kimbell* (including the Chamber of Commerce, which so appeared) ever suggested that the federal question had not been properly presented in the state court system, or that the question was not before this Court on the merits. And "dismissal for want of a substantial federal question" is the expression consistently used by this Court to denote a summary decision on the merits of an appeal from a state court. (See *Hicks, supra,* 422 U.S. at 344; R. Stern & E. Gressman, Supreme Court Practice 197 (4th ed. 1969); C. Wright, Law of Federal

and the Court acted after unusual airing of that question.[18] At any rate, even viewed *de novo,* the legislative history explored by the Solicitor General compels the conclusion that Congress intended to permit, but not require, states to pay unemployment compensation benefits to persons directly involved in labor disputes.

2. The denial of unemployment benefits to strikers is not, of course, challenged in this case; and the rationale of the lower court decision would clearly permit such exclusion as consistent with the equal protection clause. Rather, the question here is whether states may deny benefits to workers who are *not* on strike, do not work at the location of the strike, are not members of the union on strike and will not benefit from the strike. Even without regard to the preemption question, it is an odd concept of state neutrality in a labor dispute to deny benefits to persons who cannot influence the outcome of the dispute, in order to decrease the economic burden on employers which ordinarily results

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Courts 495 (2d ed. 1970). Cf. *Colorado Springs Amusements, Ltd.,* 44 U.S.L.W. 3758, 3759 n. 1, 3760 (Brennan, J., dissenting).) The rubric used to denote dismissal where the federal question was not timely or properly raised in state court is dismissal "for want of a properly presented federal question." See, e.g., *National Gypsum Co.* v. *Louisiana Dept. of Employment Security,* 313 F.2d 527 (La. Sup Ct.), *appeal dismissed for want of a properly presented federal question,* 423 U.S. 1009, in which there was an attempt to raise basically the *same* question decided in *Kimbell,* but the supremacy clause challenge had been untimely in the state courts.

[18] In addition to the usual Jurisdictional Statement and Motion to Dismiss, there were filed in *Kimbell,* before decision, the Solicitor General's memorandum noted earlier, a brief *amicus curiae* of the Chamber of Commerce (similar to its submission in this case), and an appellants' Supplemental Brief in Response to the Memorandum for the United States as *Amicus Curiae.*

from lay-offs.

It is, however, preeminently clear with regard to this exclusion that the Social Security Act affirmatively permits states to pay benefits to persons in the position of the *Hodory* class. For in January 1936, six months after both the Social Security and National Labor Relations Acts were passed, the Social Security Board issued two draft state unemployment compensation bills, which were stated by the Board to "[meet] the • • • standards required under the federal social security act for state unemployment compensation laws." (Social Security Board, *Draft Bills for State Unemployment Compensation of the Pooled Fund and Employer Reserve Account Types* (1936) (cover page).) The Board noted further: "This draft is merely suggestive • • •. Therefore, it cannot properly be termed a 'model' bill or even a recommended bill. This is in keeping with the policy of the Social Security Board of recognizing that it is the final responsibility and the right of each state to determine for itself just what type of legislation it desires and how it shall be drafted." (*Id.*) Thus, while provisions included in the draft bills were determined to be consistent with federal law, they were *not* determined to be required by federal law. For this reason, neither the fact that *a* labor dispute disqualification was included, nor the precise formulation adopted, portends a determination that such is required, but the language of the draft bills does demonstrate that the Board regarded such provisions as permissible and, therefore, not preempted.

The draft bills both provided, with respect to the labor dispute disqualification, that claimants are disqualified:

"For any week in which it is found by the commission

that his total or partial unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment or other premises at which he is or was last employed, provided that this subsection shall not apply if it is shown to the satisfaction of the commission that:

"1. He is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work; and

"2. He does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute;

"and provided further that if in any case separate branches of work, which are commonly conducted as separate businesses in separate premises, are conducted in separate departments of the same premises, each such department shall for the purposes of this subsection be deemed to be a separate factory, establishment or other premises." (*Id.*, at § 5(d).)[19]

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[19] Before the Act was passed, the Committee on Economic Security prepared draft unemployment bills. Hearings on 5.1130 before the Senate Committee on Finance, 74th Cong., 1st Sess., "Economic Security Act," February 9, 1935, pp. 591-632. These bills varied somewhat from the ones later distributed by the Social Security Board. In particular, the labor dispute provision provided simply that:

"An employee shall not be eligible for benefits for any week in which his total or partial unemployment is directly due to a labor dispute still in active progress in the establishment in which he is or was last employed." (*Id.*, at 601, 621).

It seems apparent that the latter formulation is not inconsistent with the earlier draft but, instead, specifies with greater precision

Under this provision it is clear that the *Hodory* class would be eligible for benefits. At least 43 jurisdictions have adopted, pursuant to this suggestion, exceptions to labor dispute provisions which render eligible persons not participating in nor interested in the dispute. (App. 66-67.)

Thus, the body then charged with administering the Social Security Act[20] determined, almost immediately after the Act was passed, that payment to persons not directly involved in a labor dispute but unemployed as a result was consistent with Congressional intent. "True it • • • is that administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons • • •. The practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." (*Norwegian Nitrogen Prod. Co.* v. *United States*, 288 U.S. 294, 315.)

3. While the foregoing demonstrates that with regard to labor dispute disqualifications generally, and with regard to disqualification of persons not themselves involved in the dispute in particular, Congress intended to permit states to exercise their own discretion, the whole pre-emption

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the meaning of "directly due to a labor dispute • • • in the establishment in which he is or was last employed."

[20] The function of administering the unemployment compensation system, originally allocated to the Social Security Board, was transferred to the Federal Security Administrator by 1946 Reorganization Plan No. 2. The functions of the Administrator with respect to unemployment compensation were later transferred to the Secretary of Labor, by 1949 Reorganization Plan No. 2, § 1. (See 42 U.S.C.A. § 503, Historical Note.)

question appears to us to have been infused into this case without any relevance at all, in an attempt to induce this Court to reconsider its decision a few months ago in *Kimbell*. For the statute here in question may not violate the equal protection clause although not pre-empted; and it may violate that clause even if it is required by federal labor policy.

Indeed, the attempts of appellant to demonstrate that the exclusion of the *Hodory* class from benefits is one which can be justified by a state policy of neutrality in labor disputes, whether that policy is in this context required by federal law or merely a state-adopted goal, are, as the district court held, completely unconvincing.[21] (App. 58.) For example, the argument that "granting of benefits to workers unemployed due to a labor dispute would place the employer in an unfair negotiating posture" is premised on the assumption that "[t]he economic advantage would go to the union who could limit and preserve its strike funds," (Br. for Appellants, at 14) and that therefore "the employer [would be] forced to subsidize a strike against himself." (*Id.*, at 23.) While this explanation would suffice to demonstrate that the exclusion of members of a striking union does not violate the equal protection clause, it is entirely unpersuasive with regard to persons who are *not* on strike, have no active labor dispute with the employer, and are not members of the union which is on strike; since such persons are not on strike, they will not receive strike fund payments if such are available through their union, and they have no means of affecting the outcome of the labor dispute. The further sugges-

[21] Appellant acknowledges that pursuit of this interest was not in fact the chief reason the Ohio legislature adopted the provision in question. Br. for Appellants, at 23.

tions that there will be an effect on the dispute through "the psychological reinforcement of knowing that their co-workers in sister unions * * * will not suffer," and that there is a "probability of collusion between unions co-existing at the same functionally integrated establishment" (*Id.*, at 23-24), ignores reality. For example, members of the *Hodory* class were not "co-workers" of the striking mine employees in any meaningful sense; they were employed hundreds of miles away, in a different industry. Nor, for the same reason, did the Steelworkers' locals "coexist" with the Mineworkers' locals in any manner likely to lead to cooperation in a labor dispute. In fact, while the sort of "collusion" feared is not specified, it is hard to imagine in what sense a determination to continue to work despite a strike by another union against a common employer could be the result of "collusion" with that union.

CONCLUSION

For the reasons stated above, this Court should consider whether the judgment below should be vacated and the three-judge district court directed to retain jurisdiction pending determination of uncertain questions of state law by the state courts. If this course is not followed, the judgment below should be affirmed.

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